

LETTER OPINION
98-L-32

March 30, 1998

Ms. Carol K. Olson
Executive Director
ND Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505-0250

Dear Ms. Olson:

Thank you for your letter asking whether certain criminal history record information regarding any employee or adults living in a foster care facility for children is subject to the state open records law.

North Dakota Century Code (N.D.C.C.) § 50-11-06.8 requires a foster care facility for children to secure fingerprints and certain other information from employees and adults living in the facility for submission to the Department of Human Services ("Department"). You advise that the Department submits the fingerprints and information to the state Bureau of Criminal Investigation (BCI). BCI requests a nationwide background check from the Federal Bureau of Investigation (FBI). Certain criminal history record information, including the FBI's response, is provided the Department.

A representative of the FBI has advised that FBI criminal history record information is governed by federal law and regulations. The representative further advised that "[d]issemination of such information outside the receiving governmental department or related agency to private entities is prohibited. Further, the exchange of [criminal history record information] is subject to cancellation if such unauthorized dissemination is made." The advice is well taken. Federal law permits the FBI to exchange identification records "if authorized by State statute and approved by the [U.S.] Attorney General, [with] officials of State and local governments for purposes of employment and licensing." Department of Justice Appropriation Act of 1973, Pub. L. No. 92-544, 1972 U.S.C.C.A.N. (86 Stat. 1115) 1302, 1307 (hereafter Pub. L. 92-544). See also 28 C.F.R. §§ 20.33, 50.12. "[S]uch exchange to be subject to cancellation if dissemination is made outside the receiving departments or related agencies." Pub. L. 92-544. See also 28 U.S.C. § 534(a)(4) (requiring the U.S. Attorney General to exchange criminal history record information with authorized state officials); 42 U.S.C. § 5119a(a) (providing state law may authorize "a nationwide background check for the purpose of determining whether a provider has been

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convicted of a crime that bears upon the provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities").

You specifically ask whether the Department has a basis under the North Dakota open records law for denying any person access to FBI criminal history record information regarding employees and adults living in a foster care facility for children once that information is in the possession of the Department.

The FBI is required to operate a criminal history record information system to facilitate background checks pursuant to federal and state law. 28 C.F.R. §§ 20.3(j), 20.31(b). 28 C.F.R. § 50.12 provides dissemination guidelines pursuant to Pub. L. 92-544. See 28 C.F.R. 20.33(a)(3). See also 42 U.S.C. § 5119a(b)(5) (providing any background check and the results are to be handled in accordance with Pub. L. 92-544). Records obtained by officials of state and local governments for purposes of employment and licensing "may be used solely for the purpose requested and cannot be disseminated outside the receiving departments, related agencies, or other authorized entities." 28 C.F.R. § 50.12(b). Furthermore, the exchange of criminal history record information for use in connection with licensing or local/state employment "is subject to cancellation if dissemination is made outside the receiving departments or related agencies." 28 C.F.R. § 20.33(b).

The state's open records law generally provides that all records of a public entity are public records open and accessible to the public "[e]xcept as otherwise specifically provided by law." N.D.C.C. § 44-04-18. The term "law" as used in this section includes federal statutes and applicable federal regulations as well as state law. N.D.C.C. § 44-04-17.1(7). See also 1994 N.D. Op. Att'y Gen. 118; Letter from Attorney General Nicholas Spaeth to Wayne Sanstead (June 6, 1986); 1985 N.D. Op. Att'y Gen. 77.

Because the dissemination of FBI criminal history record information outside of the receiving department is prohibited under federal statutes and regulations, it is my opinion that such information is confidential and may not be disclosed to the public under the open records law. N.D.C.C. §§ 44-04-17.1(3), 44-04-18(1); Pub. L. 92-544; 28 C.F.R. §§ 20.33, 50.12(a), (b).

Sincerely,

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Heidi Heitkamp
ATTORNEY GENERAL

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